Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

14136/2004

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: ~~16063-2004~~ - Action 1

CALENDAR NO.: 200602289MV

MOTION DATE: February 23, 2007
ADJ. DATE: April 4, 2007
MOT. NO.: 003 MOT D

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LORD ADIMOLA,

Plaintiff,

-against-

COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT and MICHAEL CAMPBELL,

Defendants.

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DANNETTE ROSS,

Plaintiff,

INDEX NO.: 16063/2004 - Action 2

-against-

LORD ADIMOLA, MICHAEL CAMPBELL and COUNTY OF SUFFOLK,

Defendants.

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PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1- 6; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 7-15; Replying Affidavits and supporting papers 16-17 ; Other 18; it is,

ORDERED that this motion by the defendants in action no.1 for summary judgment dismissing action no.1 for failure to meet the serious injury threshold and to dismiss action no. 2 as against the COUNTY OF SUFFOLK and MICHAEL CAMPBELL for failure to attend a hearing pursuant to the General Municipal Law §50-h is decided as follows:

Theses actions are for personal injuries from a motor vehicle accident on April 30, 2007. Plaintiff, LORD ADIMOLA, was the driver and owner of a vehicle which came into contact with

a Suffolk County Police vehicle being driven by MICHAEL CAMPBELL. Plaintiff in action no.2, Dannette Ross, was a passenger in the Adimola vehicle. After being notified, DANNETTE ROSS failed to attend a GML§50-h hearing. Besides the failure to attend a 50-h hearing and the lack of a serious injury with regard to each of the plaintiffs, moving defendants also seek dismissal because the police vehicle was engaged in an emergency operation and was not being operated in a reckless manner.

It is undisputed that the police vehicle entered the intersection where the accident took place without stopping at the stop sign regulating his direction of travel. He then hit the plaintiffs' vehicle which was already in the intersection. MICHAEL CAMPBELL testified that he was assisting in the pursuit of a fleeing felon in response to a radio call. Plaintiff, DANNETTE ROSS, counters with audio tapes of three calls during the relevant time frame which raise an issue of fact as to whether or not the police officer was responding to a radio call.

A police officer, while driving a police vehicle in response to a radio dispatch call, enjoys a qualified privilege under Section 1104 of the Vehicle and Traffic Law, which permits him to disregard a stop sign and proceed into an intersection unless his conduct rises to a level of reckless disregard for the safety of others (*Criscione v. City of New York,* 97 N.Y.2d 152, 736 N.Y.S.2d 656, 762 N.E.2d 342;Vehicle and Traffic Law § 114-b). However here, as noted above, the plaintiffs have raised an issue of fact as whether or not MICHAEL CAMPBELL was in fact responding to a radio dispatch call. Accordingly, this is a question for the jury *(Houston v. City of New York*, 256 A.D.2d 277, 682 N.Y.S.2d 380).

Turning to the failure of plaintiff, DANNETTE ROSS, to attend a GML§50-h hearing, the law is clear that a potential plaintiff who has not complied with General Municipal Law § 50-h(1) is precluded from commencing an action against a municipality (General Municipal Law § 50-h [5]; *Bailey v. New York City Health and Hospitals Corp.* ,191 A.D.2d 606, 595 N.Y.S.2d 247). The moving defendants present proof that the DANNETTE ROSS' hearing was initally scheduled for September 8, 2003 and adjourned at her request to September 15, 2003; that she did not attend and failed to reschedule. The opposition filed by DANNETTE ROSS does not address this issue. Accordingly, action no. 2 is dismissed.

The remaining issue is whether or not LORD ADIMOLA suffered a serious injury as defined under the Insurance Law §5102(d). Plaintiff claims both a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member and that he was unable to perform his daily activities for at least 90 of the first 180 days immediately following the accident.

Under the law in an action to recover for personal injuries resulting from an automobile accident, plaintiff has the burden to set forth a *prima facie* showing of serious injury within the meaning of the Insurance Law §5102 (d).Whether the burden has been met is initially a matter of law for determination by the court (*Licari v. Elliott* 57 N.Y.2d 230, 455 N.Y.S.2d 570). As the moving party, a defendant has the initial burden to establish that plaintiff did not sustain a serious injury within the meaning of the statute.

LORD ADIMOLA was taken by ambulance from the scene of the accident on April 30, 2003 to a hospital emergency room where x-rays were taken and he was released. He sought treatment with Dr. Soccarro Vicente on May 2, 2003 and treated with her until August 19, 2003.

The sworn report of the MRI of the lumbrosacral spine taken on June 4, 2003 found decreased T1 marrow signal and developmental foraminal narrowing in the lower lumbar region. The sworn report of the MRI of the cervical spine taken on June 3, 2003 found central disc herniation at C5-6; chiari I anomaly; associated syringohydromyelia of the entire cervical cord; deceased T1 marrow signal; and cervical scoliosis and loss of the normal cervical lordosis, likely related to muscle spasm/pain. The final report of Dr. Soccarro Vicente states that MR. ADIMOLA has cervical radiculopathy with spasm, secondary to the motor vehicle accident; central disc herniation C5-S1 and cervical scoliosis and loss of normal cervical lordosis. She states that he is partially disabled and has not yet returned to work but will return to work on August 25, 2003. MR. ADIMOLA returned to Dr. Vincente for a physical examination on March 8, 2007, she found continued cervical and lumbar radiculopathy, tendonitis and derangement of the left shoulder; cervical scoliosis; central disc herniation at C5/6with mass affect at the ventral thecal sac; and foraminal narrowing at L4/5 and L5/S1. She recommended chiropractic care and physical therapy. Her range of motion tests indicate a reduced cervical flexion.

Defendant proffers the report of Dr. Joseph L. Paul, an orthopedic surgeon, who examined the plaintiff on June 17, 2003 which recites that the patient reported that he returned to work six days after the accident. His diagnosis is resolved sprain of the cervical and lumbar spine and of the left shoulder. He states that he has no disabilities. A report of Ellen Loi Nussbaum-Bloner, a chiropractor who examined the plaintiff on June 17, 2003, also states the plaintiff returned to work after six days and her diagnosis was resolved cervical and lumbar sprain-strain. Defendant's orthopedist, Dr. Bernhang, examined the plaintiff on May 17, 2006 and found no objective findings to correlate with the plaintiff's subjective complaints of pain and restrictions of movement. Defendant's neurologist, Dr. Howard Reiser, examined the plaintiff on May 8, 2006 and found no objective neurological deficits. He explained the MRI findings as related to an underlying congenital neurocutaneous syndrome unrelated to the accident.

Soft tissue injury involving complaints of pain in the neck and back due to strain/sprain do not generally meet the threshold for serious injury (*Georgia v. Ramautar*, 180 AD2d 713, 579 NYS2d 743). However, such injuries may constitute a serious injury if certain proof is submitted. The case law requires objective proof of both the pain and the limitation of movement. Proof of a disc herniation alone without objective proof of limitation of movement is insufficient to meet the threshold (*Uber v. Heffron*, 286 A.D.2d 729, 730 N.Y.S.2d 174; *Descovich v. Blieka*, 279 A.D.2d 499, 718 N.Y.S.2d 870); as are a doctor's observations of pain accompanied by reduced flexion unless accompanied by objective proof such as x- rays, MRIs, straight-leg or Laseque tests, and any other similarly recognized tests or quantitative results based on a neurological examination (*Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233). Furthermore, even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a gap in treatment, an intervening medical problem or a preexisting condition, summary dismissal of the complaint may be appropriate (*Pommells v. Perez* 4 N.Y.3d 566,797 N.Y.S.2d 380, 830 N.E.2d 278).

Defendants have meet their initial burden to show that the plaintiff suffered a resolved cervical lumbar and shoulder sprain/ strain and that the plaintiff returned to work within six days of the accident. Accordingly, the burden shifts to the plaintiff. Plaintiff has failed to explain the gap in treatment between August 19, 2003, at which time his doctor found that he was only partially disabled and that he was expected to return to work on August 25,2003, and his recent examination, for purposes of this application, on March 7, 2007. Accordingly, plaintiff has failed

to meet his burden, to raise an issue of fact concerning a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member. Regarding the category of 90/180 days, there are issues of fact as to whether or not the plaintiff returned to work. The doctors' reports indicate that the plaintiff related conflicting facts concerning his work status post accident. Accordingly, plaintiff has raised issues of fact concerning whether or not he was unable to perform substantially all his daily activities for at least 90 days of the first 180 days after the accident.

In summary, action no. 2 is dismissed as against the COUNTY OF SUFFOLK and MICHAEL CAMPBELL and action no. 1 is to be tried, as there are issues of fact as to whether or not the police vehicle was engaged in an emergency call and whether or not plaintiff can establish a serious injury under the 90/180 day category.

Date: June 12, 2007

HON. PAUL J. BAISLEY, JR.
J.S.C.

____ **FINAL DISPOSITION** __X___ **NON-FINAL DISPOSITION**